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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

PAUL LEE SWEENY, *Petitioner*

V.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI

The petitioner Paul Lee Sweeny respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on January 6, 1976.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported appears in the Appendix hereto. No opinion was rendered by the District Court for the Eastern District of Virginia.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on January 6, 1976, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

1. Whether pretrial summary judgment can be granted finally dismissing petitioner's complaint for damages, by a District Judge who did not hear oral argument on the pretrial motion and after the motion had been argued before a different District Judge.

2. Whether a county assistant prosecutor is immune from suit for damages under Title 42, Section 1985 (3) U.S.C. for conspiring to and intentionally depriving petitioner of his Fifth and Fourteenth Amendment Constitutional rights by wilfully, intentionally and maliciously concealing from the court the fact that petitioner had previously been twice acquitted of the same charge after jeopardy attached, thereby concealing exculpatory evidence from the court, and where, prior to and during the third trial, the said prosecutor intentionally mislead the court by falsely stating, inter alia, that the two previous prosecutions of petitioner were for different offenses from that involved in the third trial.

3. Is a county magistrate immune from an action for damages under Title 42, Section 1985 (3), U.S.C., where he intentionally issued a third criminal process against petitioner for the same offense with knowledge that petitioner had twice previously been tried and acquitted of the same offense after jeopardy attached, thereby conspiring to deprive petitioner of his Fifth and Fourteenth Amendment Constitutional rights.

4. Is "good faith" an absolute defense to a Title 42, Sections 1983 and 1985 (3) action for damages against a county official, there being no evidence to support such defense.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V.

* * * Double Jeopardy; * * *

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * *

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

* * * Privileges and immunities; Due Process; Equal protection. * * *

Section 1. * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 42:

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom or usage of any Sta-

te or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Section 1985. Conspiracy to interfere with civil rights - * * *

Depriving persons of rights or privileges.
(3) If two or more persons in any state or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators. R.S. Section 1980.

STATEMENT OF THE CASE

On December 20, 1973, respondent Francis D. Lentini, in his capacity as Chief of Housing and Licensing of Fairfax County, Virginia, swore to a criminal complaint charging petitioner with violating Section 1309.1 of the Fairfax County Building Code Ordinance on or about December 8, 1973. Said criminal complaint read as follows, in pertinent part:

> " * * * that he (petitioner) has a demolished structure on * * * 9601 Saintsbury Drive (in Fairfax County), and such vacant, hazardous structure has not been filled, graded or maintained at the established street grades at curb level and that the aforesaid lot contains rubbish and further is unsafe and hazardous to the life or health of the public."

On February 19, 1974, after a trial during which three witnesses testified and jeopardy attached, the Fairfax County General District Court, not a court of record. dismissed the aforesaid charge and acquitted petitioner.

On March 1, 1974 respondent Lentini, acting in the same capacity as on December 20, 1973, again swore to a criminal complaint charging petitioner with violating the same Section 1309.1 of the Fairfax County Building Code Ordinance on March 1, 1974. The second criminal complaint against petitioner read as follows, in pertinent part:

> " * * * that Paul Lee Sweeny * * *,did, in the County aforesaid, on or about the 1st day of March, 1974, unlawfully, in violation of County Ordinance, Section 1309.1 of the Virginia Uniform Statewide Building Code (identical with Fairfax County Ordinance) allow the building which has been torn down to remain at 9601 Saintsbury Drive, Fairfax County; said remains are a hazard to public safety and therefore, a violation of said code."

On April 30, 1974, the second charge against petitioner was dismissed by a different Judge of the General District Court of Fairfax County, Virginia after jeopardy attached. The same witnesses who testified at the first trial again testified at the second trial and gave substantially the same testimony

they gave at the February 19, 1974 trial. The second prosecution of petitioner by respondent Lentini involved the same condition of the same property that were involved in the first trial.

On August 2, 1974, respondent Lentini, still acting in the aforesaid capacity, for the third time swore to a criminal complaint against petitioner charging him with violating the same Section 1309.1 of the Fairfax County Building Code Ordinance on July 19, 1974. The third criminal complaint against petitioner read as follows, in pertinent part:

> " * * * that Paul Lee Sweeny * * * did, in the County aforesaid, on or about the 19th day of July, 1974, unlawfully, in violation of County Ordinance, Section 1309.1 of the Fairfax County Building Code * * * in that he has a demolished structure on Parcel 91, Map 48-1, known as 9601 Saintsbury Drive (Fairfax County) and such vacant hazardous structure has not been filled, graded or maintained at the established street grades at curb level and that the aforesaid lot contains rubbish and further is unsafe and hazardous to the life or health of the public."

On October 3, 1974, still another Judge of the Fairfax County General District Court dismissed the third charge thus brought against Petitioner after jeopardy had attached. The witnesses present and prepared to testify at the third trial had testified at the first two trials.

All three criminal prosecutions thusly instituted by respondent Lentini against petitioner involved the same condition of the same property. There was no difference in the testimony actually given at the first two trials, and the testimony that would have been given at the third trial. The first and third criminal complaints sworn to by respondent Lentini against petitioner were word for word identical, and the second of the three criminal complaints was in all pertinent aspects, identical with the other two, except for dates.

Subsequently, respondent Lentini testified on deposition that he was studying the County Code to see if he could find another section of the Code under which he could bring more prosecutions against petitioner for the same condition of the same property.

The instant civil action was filed by petitioner against respondents in the District Court on September 20, 1974. The first Count of this civil action alleged a conspiracy among all respondents to violate petitioner's civil rights in violation of Section 1985 (3) of Title 42, U.S.C. and the Fifth and Fourteenth Amendments to the Constitution of the United States, for having placed petitioner in jeopardy three times for the same offense. The second count of this civil action charged respondent Lentini with a direct violation of petitioner's right protected by Title 42, Section 1983, U.S.C., and the Fifth and Fourteenth Amendments to the Constitution of the United States not to be subject for the same offense to be twice put in jeopardy.

Petitioner filed timely motions in the Fairfax County General District Court to dismiss the second and third criminal prosecutions on the grounds of Double Jeopardy and collateral estoppel.

The specific allegations made against defendants Shenk and Keenan are found in paragraphs 11-14, inclusive, on page 4 of petitioner's complaint and allege as follows:

> "11. The defendant Shenk, at the behest of the defendant Lentini, has wrongfully, maliciously, and without probable cause, issued a third criminal summons against plaintiff, for the same alleged violation hereinbefore mentioned (Section 1309.1 of the Building Code) and which has heretofore been twice dismissed by the said court, whereby plaintiff would be required to defend himself for a third time against the aforesaid wrongful allegations of the defendant Lentini, after he, the said defendant Shenk had been informed

that the two previous criminal charges had been dismissed by the court. (parenthetical matter added).

"12. The defendant Keenan, at the behest of the defendant Lentini, has falsely and maliciously made false representations to the aforesaid General District Court of Fairfax County, Virginia, and has maliciously slandered plaintiff's aforesaid property known as 9601 Saintsbury Road, Fairfax, Virginia.

"13. And the defendant Keenan has wrongfully and maliciously advised, counselled, encouraged, aided and abetted the defendant Lentini to continue his reckless and unlawful course of conduct against plaintiff designed to harass and intimidate plaintiff by continually swearing to criminal charges against plaintiff, in an attempt to force plaintiff to remove certain building and other materials now stored on plaintiff's said land.

"14. That the defendant Keenan has wilfully, wantonly and maliciously falsely represented to the General District Court of Fairfax County, Virginia, as follows:

(a) Falsely stated to said court that the two previous trials of the same charge now pending before said court were "zoning cases" and therefore were not the same issue as is involved in the pending case;

(b) Falsely stated to said court neither of the two previous trials had been trials on the merits;

(c) Slandered plaintiff's aforesaid property maliciously; (Page 5 of the Complaint);

(d) Falsely stated that the first charge against plaintiff had been dismissed by the court on February 19, 1974, because of the lack of a search warrant;

(e) Wrongfully suppressed the facts and circumstances surrounding the first trial on

February 19, 1974 and the second trial on April 30, 1974, involving the same identical issue as is involved in the criminal charge now pending against plaintiff."

Although respondents Keenan and Shenk each filed an affidavit in the District Court in support of their respective motion for summary judgment, there was no denial of the aforesaid allegations under oath.

Respondent Keenan filed a motion to dismiss in the District Court on the grounds the complaint failed to state a cause of action against him. After hearing oral argument on the motion, District Judge Lewis denied the same.

Thereafter, all defendants filed motions for summary judgment, with affidavits in support thereof, as did the petitioner, and all parties requested hearings on their respective motions. The motions came on for argument on February 15, 1975, before District Judge Lewis who took the same under advisement. Before Judge Lewis could rule on the motions for summary judgment, the instant case came on for trial before District Judge Bryan, Jr., and the following occurred in Chambers prior to the Trial:

"The Court: I want to announce to you my ruling on motion for summary judgment. I understood Judge Lewis had heard argument on it. So I am going to rule on it.

"Mr. Sullivan (counsel for petitioner): Without argument?

"The Court: Yes, sir. I read the briefs, and I see no reason for further argument.

"I think the assistant Commonwealth Attorney whose name is --

"Mr. Sullivan: Keenan.

"The Court: --Keenan should be dismissed because he is immune. The allegation is with regard to him in my view have to do with his performance of duties that are part of

the judicial process. I am unwilling to follow the Hilliard case that the Fourth Circuit discussed in the Ebert decision. They do not follow it and say no occasion to decide whether they should follow it.

"But on the basis of both the Wethers (sic) v. Ebert case and the McRay (sic) v. Maryland case I find that Keenan is immune. Therefore, for failure to state a cause of action insofar as damages are concerned he will be dismissed from the case and that does not dismiss him from the case insofar as injunctive relief is concerned, however, but since the only thing that is going to the jury this morning is the question of damages he will be dismissed from that portion of the suit.

"Likewise, Shenk is immune. His duties in determining whether or not to issue an arrest warrant are in my view both quasi-judicial and discretionary, and I think that he, under the McRay case, is immune for any suit for damages. Accordingly, he will be dismissed from the case, insofar as the request for damages are concerned.

"That leaves, of course, Lentini. The motion for summary judgement will be denied as to Lentini."

A jury was thereupon empanelled and upon the conclusion of the plaintiff's evidence the following occurred:

"The Court: Mr. Sullivan, tell me what is the constitutional deprivation of which you complain.

"Mr. Sullivan (counsel for petitioner): The constitutional deprivation of which I and my client complain is that he has three times been put in jeopardy for the same occurrence.

"The Court: It is a violation of the Fifth Amendment prohibition against double jeopardy?

"Mr. Sullivan: Yes, sir.

"The Court: Is that it?

"Mr. Sullivan: That's it.

* * * * * *

"The Court: In view of the narrow issue presented to the Court, which is that there is a violation of 42 U.S.C. S 1983 consisting solely of the plaintiff here being placed in jeopardy more than once for the same offense in violation of the Fifth Amendment, I think the motion of the defendant must be granted.

"I don't want to throw the plaintiff out on a technicality, and he may have a malicious prosecution suit in the State Court. He expressly disclaims, however, any intent to assert that claim here, or to assert any claim except the constitutional deprivation, a constitutional deprivation which is limited to a violation of the Fifth Amendment right not to be placed in jeopardy more than once for the same offense.

* * * * * *

"Mr. Symanski: We will represent that Mr. Lentini will not proceed under 1309.1 under the same set of facts and the same property.

"The Court: Against Mr. Sweeny?

"Mr. Symanski: Right.

"The Court: All right. That strengthens my determination that the injunction should be denied, and for the reasons I have said, based on the evidence I have heard here this morning, ---

"Mr. Sullivan: Your Honor, may I ask to get in the record --

"The Court: - - will be denied.

"Mr. Sullivan: - - in the records that this is the same factual situation on all three things, and that is the basis and the fact. I want that just in case we desire to pursue it further.

* * * * * *

"The Court: **********

"He may have been wronged, but his only basis for federal jurisdiction, that is having a suit in federal court, is to show a violation of a constitutional right.

* * * * * *

"Any suit he may have must be brought elsewhere and not in federal court. * * * *"

The granting of Summary Judgment by District Judge Bryan, Jr., in favor of respondent Keenan and Shenk, without a hearing was ignored by the Fourth Circuit although the matter was dicussed extensively by petitioner in that Court. The opinion and judgment of the Fourth Circuit, therefore, affirmed District Judge Bryan, Jr.'s, pre-trial grant of Summary Judgment in favor of respondents Keenan and Shenk and operated as a final dismissal of petitioner's complaint against said respondents without petitioner ever having a hearing on the matter.

The opinion and judgment of the Fourth Circuit upheld the action of the District Court in taking the case away from the jury and dismissing the complaint against respondent, Lentini. The Fourth Circuit, without evidence, assigned as reason for its affirmance that respondent Lentini had acted in good faith in bringing three criminal prosecutions against petitioner for the same fact situation, and refused to allow the jury to decide the factual question of good faith. Respondent Lentini put on no evidence at all, and petitioner's evidence certainly did not show good faith on the part of respondent Lentini

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AS TO THE PROPER INTERPRETATION OF RULE 56, FEDERAL RULES OF CIVIL PROCEDURE, AND WITH THE PROVISIONS OF RULE 56 ITSELF.

RULE 56

SUMMARY JUDGMENT

(c) Motion and proceedings thereon. The Motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. * * *

(d) * * *(T)he Court at the hearing of the Motion * * *.

The plain language of Rule 56, Federal Rules of Civil Procedure, itself provides for a hearing on a motion for summary judgment. This obviously presupposes a hearing before the judge who is to rule on the motion.

It has been squarely held, by the Ninth Circuit and by the Seventh Circuit that, since the granting of a motion for summary judgment disposes of the action on the merits, with prejudice, a District Court may not, by rule or otherwise, preclude a party from requesting oral argument nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied.

In Brown v. Quinlan, (7 Cir. 1943) 138 F.2d 228, the Seventh Circuit held it was reversible error to grant a motion for summary judgment finally disposing of the cause without final hearing, the Court saying:

> "To effect an involuntary termination of a suit requires, in the absence of waiver of final hearing, a hearing upon a motion for summary judgment or to dismiss the complaint. No such hearing was had. The complaint on its face was sufficient and it was error, therefore, finally to dispose of the cause without final hearing."

In the case at bar, respondent Keenan's motion to dismiss petitioner's complaint was denied by District Judge Lewis, thereby establishing the sufficiency of petitioner's complaint, on its face, as to respondent Keenan.

The Ninth Circuit has held it is reversible error for a District Judge to grant a motion for summary judgment without hearing oral argument. Precisely in point, and squarely so holding is Dredge Corporation v. Penny (9 Cir. 1964) 338 F.2d 456, 460-462, where the Court said:

> "* * * The Dredge Corporation argues that the District Court erred in acting upon the motions for summary judgment without first hearing oral argument.
>
> * * * * * *
>
> "Rule 56, Federal Rules of Civil Procedure, providing for summary judgment, appears to contemplate that a hearing will be had before such a motion is acted upon. Rule 56 provides that the motion '* * * shall be served at least 10 days before the time fixed for the hearing.' It is further provided in that paragraph of the rule that the adverse party '* * * prior to the day of hearing may serve opposing affidavits.'
>
> * * * * * *
>
> "* * * In view of the language of Rule 56 (c) and having in mind that the granting of such a motion disposes of the action on the merits, with prejudice, a district court may not, by rule or otherwise, preclude a party from requesting oral argument, nor deny such a request when made by a party opposing the motion unless the motion for summary judgment is denied. See Brown v. Quinlan, 7 Cir. 138 F.2d 228, 229.
>
> * * * * * *

> "The failure to permit oral argument on the motions for summary judgment requires that the judgments be reversed and the causes be remanded for further proceedings."

The opinion and judgment of the Fourth Circuit in the instant case affirming the granting of summary judgment by District Judge Bryan, Jr., which disposed of the action on the merits, with prejudice, without permitting oral argument on the motions, is in conflict with the rule in the Seventh and Ninth Circuits.

These conflicts justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW, HOLDING THAT A PROSECUTOR INTENTIONALLY CONCEALING EXCULPATORY EVIDENCE FROM THE COURT IS IMMUNE FROM AN ACTION FOR DAMAGES CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In Hilliard v. Williams, 465 F.2d 1212 (6 Cir. 1972), the Sixth Circuit denied immunity to a prosecutor charged with the deliberate suppression of an FBI laboratory report that established the innocence of the defendant, on the grounds that since it is a prosecutor's duty to protect the innocent as well as to convict the guilty, his discretion does not extend to seeking the conviction of a person he knows to be innocent. In the case at bar, prosecutor Keenan knew about the first two trials in both of which petitioner was acquitted. He therefore had information which he knew exculpated petitioner and he intentionally concealed it from the court.

In an earlier case, Weathers v. Ebert, 505 F.2d 514, the Fourth Circuit recognized that the rule announced by the Sixth Circuit in Hilliard (supra)

> "represents a real, but very limited departure from the traditional rule of prosecutorial immunity. The complaint charged an intentional abuse of the prosecuting function which resulted in a denial of due process" (page 516 of 505 F2d)

but, in the case at bar, the Fourth Circuit refused to follow Hilliard.

Here, the prosecutor (respondent Keenan) not only intentionally concealed from the General District Court of Fairfax County, Virginia, a court not of record, the fact that petitioner had twice previously been placed in jeopardy on the same criminal charge, and twice acquitted, but he falsely stated to said court that the two previous trials were "zoning cases", which they were not; falsely stated to said court that neither of the two previous trials were on the merits, whereas both trials were on the merits; and falsely stated to said court that the first charge against petitioner was dismissed for lack of a search warrant, whereas in fact it was dismissed because the prosecution's evidence was not sufficient to convict.

The Eighth Circuit has held that prosecutors who act outside the scope of their jurisdiction still have available the defense of good faith and probable cause. Wilhelm v. Turner, 431 F.2d 177 (8 Cir. 1970), cert. denied 401 U.S. 947, 91 S.Ct. 919, 28 L.Ed. 2d 230 (1971). But it was held in Haaf v. Grams (U.S.D.C.D. Minn., Fourth Division, 1973) 355 F. Supp. 542, that the defense (good faith) itself raises questions of fact which may not be determined without hearing evidence, and the court denied the prosecutor's motion for dismissal on the basis of prosecutorial immunity, just as District Judge Lewis did in the case at bar. District Judge Bryan, Jr., however, later granted the prosecutor's motion for dismissal on the basis of prosecutorial immunity without hearing evidence and without a hearing of any kind, and the Fourth Circuit affirmed.

In Hampton v. City of Chicago, et al., (7 Cir. 1973) 484 F.2d 602, 609, the Seventh Circuit held that prosecuting attorneys may be held liable in damages under Title 42, Sections 1983 and 1985 (3) for conspiracy to cause false arrest and

imprisonment of plaintiffs, the institution of an unfounded prosecution, and the concealment of the truth.

This Court has not had occasion to rule on the question of immunity from damages based upon the performance of duties that are a part of the judicial process, except as to judges, whether they be prosecutorial or quasi-judicial as in the case of respondent Shenk.

Title 42, Sections 1983 and 1985 (3) apply to "every person" and to "two or more persons". Those sections do not contain any exceptions in favor of prosecutors or magistrates and no judicial gloss should be engrafted on them to render such officers immune from damages for their intentional wrongdoing. To the extent those officers acted outside the scope of their duties they should be held liable to petitioner in damages.

The conflict between the Fourth Circuit opinion in the case at bar and the decisions of the Sixth, Seventh and Eighth Circuits justifies the grant of certiorari to review the judgment below.

3. THE FOURTH CIRCUIT, IN AFFIRMING, SAID RESPONDENT LENTINI ACTED "IN GOOD FAITH", AND CITED PIERSON v. RAY, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed. 2d 288 (1967).

Pierson v. Ray, supra, did hold that good faith and probable cause was a bar to recovery against police officers for unlawful arrest under Section 1983 of Title 42. The defense, however, must be asserted and then proven at a trial on the merits, as was in fact done in Pierson, and good faith certainly cannot be determined upon motion for directed verdict at the close of plaintiff's case. Respondent Lentini put on no evidence at all at the trial. His pretrial deposition was not in evidence. Petitioner's evidence showed many instances of bad faith on Lentini's part in prosecuting petitioner three times for the same offense, including Lentini's statement on

deposition, after petitioner had been acquitted three times, that he (respondent Lentini) continued to prosecute petitioner because he had been told that in case he ever won a case and got a conviction, he could then prosecute petitioner again every day for the same offense; and that after petitioner's third acquittal of the same charge, he (Lentini) was reading the building code to try and find yet another section under which to prosecute petitioner for the same condition of the same property. The action of the Trial Court denied petitioner his right to a trial by jury on the question of Lentini's good faith.

4. THE DECISION BELOW RUNS CONTRARY TO DECISIONS OF THIS COURT HOLDING THAT THE DOUBLE JEOPARDY CLAUSE INCLUDES COLLATERAL ESTOPPEL.

ASHE v. SWENSON, 397 U.S. 436, 25 L. Ed. 2d 469 90 S.Ct. 1189 (1970) holds that collateral estoppel is a part of the Fifth Amendment's guarantee against Double Jeopardy, and protects a person who has been acquitted from having to "run the gantlet" a second time.

Applying the rationale of Ashe, supra, to the facts of the case at bar, it appears that the pleadings in all three prosecutions here involved are the same (the charges), the evidence adduced in each of the three trials was the same (the third trial was decided on stipulations), and that every possible issue involved in the second and third trials was decided adversely to the contention of the prosecution by the general verdict of not guilty in the first trial. The second trial was nothing but a re-run of the first trial. And the third trial, upon the stipulations, was likewise a re-run of the first and second trials. Both the petitioner and the prosecution witness Hill, a county sanitarian, testified that the evidence at the first and second trials was the same, and that had testimony been given at the third trial, that would likewise have been the same.

There cannot be any doubt but that petitioner was put in jeopardy in all three trials for alleged violation of section 1309.1 of the building code ordinance. In Breed v. Jones, (decided May 27, 1975), 421 U.S. 519, 95 S.Ct. 1779, ___ L.Ed.2d___, this Court held that prosecution of a state prisoner as an adult in California Superior Court after an adjudicatory finding in juvenile court, violated his constitutional protection against Double Jeopardy, the Court saying (pages 1785 and 1787 of 95 S.Ct.) that "jeopardy attached * * * when the juvenile court, as the trier of the facts, began to hear evidence."

Accordingly, when Judge Whitestone, on February 19, 1974, began to hear evidence in petitioner's trial in the General District Court of Fairfax County, Virginia, petitioner was placed in jeopardy. Jeopardy having attached, petitioner could not constitutionally be again tried in any case involving the same issues. Said trial, at which the prosecution adduced the testimony of three witnesses in an attempt to convict petitioner of violating section 1309.1 of the building code ordinance, adjudicated that petitioner was not guilty of the charge, including all issues involved therein. Said trial was an adjudicatory hearing at which petitioner was put in jeopardy.

Multiple prosecutions based on the same condition of the same property cannot be permitted on the theory that said condition is a continuing offense, for many reasons. Firstly, the trial of February 19, 1974, determined that the condition of petitioner's property was not an offense. There being no offense, the same condition of the same property cannot be a continuing offense. Two times zero is still zero and three times zero is likewise still zero. Secondly, based on the uncontradicted evidence, petitioner did not maintain his property in a way so as to be hazardous to the public generally. The only basis for interference with petitioner's property right to use his property

as he sees fit, is the police power of the state. There was never a citizen complaint, and only respondent Lentini complained. The only person residing near it said it was not dangerous and the county health sanitarian said there was only the potential for danger, which can be said about any property. The trial on February 19, 1974, determined there was no condition on petitioner's property dangerous to life or the health of the public.

The District Court should have enjoyed respondents from prosecuting petitioner in the future based on any charge involving the same condition of the same property. The District Judge recognized that respondents could not again prosecute petitioner for alleged violation of section 1309.1 of the building code. In this, however, he did not go far enough because he failed to apply the doctrine of collateral estoppel. He left the door open to respondents to prosecute petitioner in the future under other section of the code or county ordinances, even though such prosecution may be for the same condition of the same property involved in all three prior prosecutions. This is clearly a threatened further violation of petitioner's constitutional rights as hereinbefore discussed. The February 19, 1974 trial was an adjudicatory hearing and adjudicated all issues involved in that trial. This includes the fact that petitioner's property was not in violation of any law. Unless prevented from doing so, respondent Lentini, who has said he is still looking for other sections of the building code to prosecute petitioner under, based on the same condition of the said property, and perhaps others acting in concert with him, will institute endless prosecutions against petitioner for the same condition of the same property in an illegal attempt to harass petitioner into doing what he says petitioner must do, even after three judges of the General District Court of Fairfax County, Virginia

have said petitioner is not required to do what said respondent is demanding. The cases holding that Federal Courts have power to grant injunctive relief against such outrageous deprivation of constitutional rights as petitioner has been subjected to are legion, and Mitchum v. Foster, 407 U.S., 225, 32 L. Ed 2d 705, 92 S.Ct. 2151 (1972) held that Title 42, Sections 1983 and 1985 are "expressly authorized" exceptions to the federal anti-injunction statute.

District Judge Bryan, Jr., acknowledged that petitioner may have been wronged and that he may have a cause of action elsewhere, but not in federal court. Monroe et al. v. Pape et al., 365 U.S. 186, 81 S.Ct. 473 (1961) held that it is wholly immaterial that the State has a law, which, if enforced would give relief. The federal remedy is supplementary to the state remedy and the latter need not be first sought and refused before the federal remedy is invoked.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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COUNSEL FOR PETITIONER

April 2, 1976

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 75-1674

Paul Lee Sweeny, Appellant,

-v-

Francis D. Lentini,
Lawrence R. Keenan, and
Glen Shenk, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., District Judge.

Argued December 3, 1975. Decided Jan. 6, 1976

Before BUTZNER and FIELD, Circuit Judges, and THOMSEN, Senior District Judge.

Charles B. Sullivan, Jr. and Paul Lee Sweeny, appellant pro se, for apellant; John J. Brandt, Robert Flinn (John K. Coleman, George A. Symanski, Jr.; Slenker, Brandt, Jennings & O'Neal, on brief) for appellees.

PER CURIAM:

Paul Lee Sweeny appeals from an order of the district court dismissing a civil action which he brought under 42 U.S.C. S 1983 against a state magistrate, prosecuting attorney, and zoning officer. We agree with the district judge that these officials did not prosecute Sweeny in violation of his right to be free from double jeopardy under the fifth and fourteenth amendments. Moreover, the magistrate is immune from civil liability for issuing the warrants. Pierson v. Ray, 386 U.S. 547 (1967). The prosecuting attorney under the facts of this case is protected by quasi-immunity. Weathers v. Ebert, 505 F.2d 514 (4th Cir. 1974). The zoning officer at all times acted in good faith pursuant to directions of the prosecuting attorney's office. He was, we believe, entitled to the qualified immunity of a police officer who acts in good faith. Pierson v. Ray, 386 U.S. 547, 557 (1967).

AFFIRMED

Supreme Court, U. S.
FILED
APR 30 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1401

PAUL LEE SWEENY,

Petitioner,

v.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-1401

PAUL LEE SWEENY,

Petitioner,

v.

FRANCIS D. LENTINI, LAWRENCE R. KEENAN, and GLEN SHENK,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

COME NOW Respondents, by counsel, and file this their Brief in Opposition to the Petition for a Writ of Certiorari previously filed herein.

QUESTIONS PRESENTED

1. Does *Imbler v. Pachtman* render the Petition for a Writ of Certiorari moot?

2. Does every party have an absolute right to oral argument of Motions for Summary Judgment irrespective of the facts and circumstances of the case?

3. Does a housing official who, in good faith, follows the directions and orders of a prosecuting attorney in obtaining multiple summonses for continuing building code violations traverse the § 1983 rights of the building code violator?

STATUTORY PROVISIONS INVOLVED

§ 122.3 BOCA Basic Building Code (1970), as amended:

122.3 Violation Penalties: Any person who shall violate a provision of the Basic Code or shall fail to comply with any of the requirements thereof or who shall erect, construct, alter or repair a building or structure in violation of an approved plan or directive of the building official, or of a permit or certificate issued under the provisions of the Basic Code, shall be guilty of a misdemeanor, punishable by a fine of not more than -- dollars or by imprisonment not exceeding one (1) year, or both such fine and imprisonment. Each day that violation continues shall be deemed a separate offense.

§ 1309.1 BOCA Basic Building Code (1970), as amended:

1309.1 Grading of Lot: When a building has been demolished and no building operation has been projected or approved, the vacant lot shall be filled, graded and maintained in conformity to the established street grades at curb level. The lot shall be maintained free from the accumulation of rubbish and all other unsafe or hazardous conditions which endanger the life or health of the public; and provisions shall be made to prevent the accumulation of water or damage to any foundations on the premises or the adjoining property.

PERTINENT RULES

Fed. R. Civ. P. 78:

MOTION DAY

Unless local conditions make it impracticable, each district court shall establish regular times and places, at intervals sufficiently frequent for the prompt dispatch of business, at which motions requiring notice and hearing may be heard and disposed of; but the judge at any time or place and on such notice, if any, as he considers reasonable may make orders for the advancement, conduct, and hearing of actions.

To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements or reasons in support and opposition.

Local Rules of Prac., 11R, U.S. Dist. Ct., E.D. Va. (1973):

(R) *Determination of Motions Without Oral Hearing:* In accordance with Rule 78, Federal Rules of Civil Procedure, all motions submitted upon written statements of reasons in support and opposition may be determined without oral hearing.

STATEMENT OF THE CASE

Respondents find Petitioner's statement of the case lacking in many particulars and would call the Court's attention to the following facts:

Petitioner-attorney Sweeny owns 4.9 acres of investment property in Oakton, Fairfax County, Virginia, and, when he acquired the property in 1956, it was

improved by an old broken down farmhouse underneath which lay a root cellar. After much ado, the Petitioner finally razed the house but refused to remove the remaining debris. The photographs of the property after the structure was demolished, introduced into evidence below, are worth a thousand words of an attempted description of the danger posed to young children who might adventure upon the junk, debris, and rotten lumber maintained by Petitioner over the now hidden root cellar.

Respondent Lentini, a housing and licensing official, together with other Fairfax County officials, tried to get Petitioner to remove the debris and fill the cellar. They wrote letters, made telephone calls, and held hearings; but Petitioner steadfastly refused to do anything about the situation. Therefore, after Petitioner lost before the Zoning Appeals Board, Respondent Lentini, charged with enforcing the housing regulations, after first securing approval and direction from the Commonwealth Attorney's office, secured a summons for Petitioner and photographed the premises. In the Fairfax General District Court (county court), Petitioner deftly argued that the photographs were inadmissible because a search warrant was not secured to permit their being taken; and he prevailed. Judge Whitestone, however, clearly informed Lentini that he could obtain a further warrant because Petitioner was committing a separate offense each day. (Affidavit of Robert C. Whitestone)

Lentini then checked with Assistant Commonwealth Attorney Davis who personally approved and drew the search warrant and then a summons for a § 1309.1 BOCA Code violation. (Affidavit of Gary Davis) This time, the crafty Petitioner argued that he was not

re-served with a notice that he was violating § 1309.1; and Judge Hurst dismissed the second warrant for that reason; but observe, Judge Hurst specifically stated in his May 9, 1974, letter-opinion, "I feel that your argument of double jeopardy does not apply to the case in hand, since Sec. 122.3 states that each day a violation continues, it shall be deemed a separate offense, and therefore double jeopardy would not attach." (Def. Ex. D-17)

Lentini then again checked with Assistant Commonwealth Attorney Davis, who again personally approved and drew a search warrant and an arrest warrant for a § 1309.1 violation; this time Petitioner was re-served with a notice, and the case was truly heard on the merits for the first time but not before Petitioner filed this suit including a prayer that the court below stop the proceeding in the County Court, which was promptly denied and affirmed by this Court.

As Lentini might have guessed from his prior luck, Judge Rothrock (even he found no double jeopardy at a preliminary hearing) threw the third summons out, holding that § 1309.1 BOCA Code did not apply to Petitioner's land.

Interspersed with Petitioner's arguments in the County Court were various civil suits and motions filed by him in the Fairfax Circuit Court where he repeatedly asked for orders to stop Respondent Lentini on the theory of double jeopardy. They were all denied. In fact, the usually adroit Petitioner became evasive and argumentative when he was asked in the trial below to name a single judge who had sustained his double jeopardy plea. The trial judge finally had to say, "The witness says he can't answer it."

Petitioner brought the action below against the Respondents for money damages and injunctive relief claiming a violation of his civil rights. Both sides filed, briefed, and argued respective Motions for Summary Judgment; and Judge Oren R. Lewis assigned a trial date on the day of the arguments. He then turned the case over to Judge Albert V. Bryan, Jr., who reviewed the briefs and, on the trial date, entered Summary Judgment for Respondents Keenan, Assistant Fairfax County Commonwealth's Attorney; and Shenk, a Fairfax County Special Magistrate. He denied Respondent Lentini's Motion for Summary Judgment, and he denied Petitioner's Motion for Summary Judgment.

The case was tried only as to Lentini; and, when Petitioner rested, Judge Bryan inquired of Petitioner's counsel what constitutional deprivation was complained of, and Petitioner's counsel answered "double jeopardy." Judge Bryan asked if counsel was sure that there was not some other claim Petitioner was presenting; but he was assured that, if Petitioner hadn't proved a double jeopardy violation, then, "We have no case." With that position unequivocably stated, Judge Bryan – with the flimsy evidence before him – had no alternative but to grant Respondent Lentini's Motion for Directed Verdict on the monetary damage claim.

Judge Bryan then asked if Petitioner wanted a decision on the injunctive relief claim based on the evidence heard thus far and was told by Petitioner's counsel, "Yes, sir." After securing a promise by counsel that Lentini would not proceed against Petitioner with any further § 1309.1 BOCA Code summonses, Judge Bryan dismissed the claim for injunctive relief.

The appeal to the United States Court of Appeals for the Fourth Circuit followed where a *per curiam* affirmance resulted; and now, Petitioner seeks this Court's assistance.

REASONS FOR DENYING THE WRIT

1. This Court has just spoken on prosecutorial immunity in *Imbler v. Pachtman* which renders the Petition moot.

In *Imbler v. Pachtman*, U.S.L. Week 4250 (U.S. Mar. 2, 1976), this Court addressed, for the first time, the 42 U.S.C. § 1983 liability of a state prosecuting attorney and concluded that he had absolute immunity from civil actions such as the instant case.

Respondent Keenan was the Fairfax County Assistant Commonwealth Attorney who had his first and only involvement with the Petitioner in reference to the third and last summons for a § 1309.1 BOCA Code violation.* Because he prosecuted the last summons, he was promptly sued by Petitioner – a frightening fact indeed. The Petitioner's logic seems to run like this: if you obtain a summons for me and if you prosecute me, I will sue you. It is hard to imagine how a system of meaningful justice could very long survive such an attack, and it is understandable why the courts have protected prosecutors as well as other judicial and quasi-judicial officers.

Mr. Justice Powell, in the *Imbler* decision, must have been thinking of this case when he penned the following:

---

*Interestingly enough, Gary F. Davis, the Fairfax County Assistant Commonwealth Attorney who counseled Respondent Lentini and actually drew all three summonses, was not sued.

> The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages. Such suits could be expected with some frequency, for a defendant often will transform his resentment at being prosecuted into the ascription of improper and malicious actions to the State's advocate. . . . Further, if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law. *Id.* at 4255.

Since this Court has so recently enunciated *Imbler*, no meaningful reason can be advanced for reviewing the case at bar.

Petitioner's failure to complain in his Petition for a Writ about Respondent Shenk's prevailing in the Fourth Circuit, apparently reflects his agreement that a quasi-judicial officer, such as Respondent Special Magistrate, shares the immunity from § 1983 actions which is possessed by a judge. *McCray v. Maryland*, 456 F.2d 1 (4th Cir. 1972). Respondent Shenk was the proverbial "guy in the middle" and surely has quasi-judicial immunity under the ruling in *McCray v. Maryland, supra.* Shenk was the special magistrate who issued the third summons at the direct order of Judge Martin Eugene Morris of the Fairfax County General District Court. The state courts, Judge Bryan, and the Fourth Circuit all refused to stay the hearing on the third summons; and such is proof perfect that Shenk was well within his rights and duties in issuing the summons.

Subjecting magistrates to lawsuits when they issue summonses is a highly questionable practice that could

have a disastrous effect on our system of justice and convert it into a system of "fear." Again, the fact that the trial court found no double jeopardy violation is further grounds for the Summary Judgment entered in Respondent Shenk's favor.

2. Oral argument before trial judge Bryan on the summary judgment motions was unnecessary under the facts and circumstances of this case.

Petitioner's complaint that trial judge Bryan not hear oral argument on the summary judgment motions he granted for Respondents Keenan and Shenk is without merit. First of all, *Imbler* makes the question moot; and, secondly, Judge Bryan had the motions before him as well as the affidavits of pertinent witnesses and extensive briefs of counsel. He read them and reached his decision, and the fact that he did not desire oral argument is not unusual for a trial judge as the federal rules specifically allow for the determination of motions without oral argument. Fed. R. Civ. P. 78; Local Rules of Prac. 11R, U.S. Dist. Ct., E.D. Va. (1973). *See, United States Fid. & Guar. Co. v. Lawrenson*, 334 F.2d 464, 467 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964); *Spark v. Catholic University*, 510 F.2d 1277, 1280 (D.C. Cir. 1975).

3. Respondent Lentini was in good faith, and Petitioner was never placed in double jeopardy since he continued to violate the building code.

Petitoner's case against Respondent Lentini centered around the sole complaint that he was placed in double jeopardy because three summonses were issued for § 1309.1 BOCA Code violations.

The photographs in evidence speak for themselves, and no rational person can look at the junk, the debris, and the litter that lays over the hidden cellar – a trap for youngsters if ever there was one – and conclude that Petitioner should not remove it. But, even to this day, Petitioner's property remains in such a state; and it is easy for Petitioner to be oblivious to the problem as he does not live there.

Petitioner has reluctantly admitted that there was an old root cellar under the debris but said he had no knowledge of children being around it. Petitioner was forced to concede that his presence on the property was limited to the times of his various hearings. Exhibit D-4, a plat of the area, clearly showed housing subdivisions and a high school in the area.

Petitioner refused to remove his debris and appealed an order to do so to the Zoning Appeals Board; by Petitioner's own concession, the Board affirmed the order.

Petitioner then sued the county officials in the Fairfax Circuit Court and tried to persuade Judge Keith to stop the hearing on the first summons, but Judge Keith refused. Petitioner then filed another preliminary motion to prevent a hearing – this motion in the County Court itself; it was denied.

After the first summons was dismissed due to lack of evidence because the photographs were ruled inadmissible, Respondent Lentini sought a search warrant for photography purposes and a second summons. It should be noted, however, that he did that *only* after

the same was recommended, approved, and drafted by Fairfax County Assistant Commonwealth Attorney Gary Davis. (See Davis' Affidavit attached to Respondents' Motion for Summary Judgment) Again, Petitioner tried to stop the hearing by applying to the Circuit Court of Fairfax; and, again, Judge Keith denied him. Again, Petitioner sought to prevent a hearing on the second summons by asking the County Court to prevent it; again, the double jeopardy argument was made and rejected.

Finally, the second summons was heard, but Judge Hurst dismissed it because the notice of violation was not re-served. Again, Petitioner had argued double jeopardy to Judge Hurst; but he specifically ruled "no double jeopardy," and, in a letter to counsel, stated Petitioner was continuing to violate the law. (Ex. D-17) Indeed, Petitioner could not cite one judge that ruled there was double jeopardy that would prevent new summonses from being issued.

Then the third summons issued, by direct order of Judge Morris (Affidavit) and deposition of Judge Morris, p. 8; but Judge Rothrock, in a highly questionable decision, held BOCA Code § 1309.1 inapplicable to the type of land in question but not before he himself had found no double jeopardy and not before Judge Bryan and this Court had likewise refused to stop the third hearing.

Robert W. Wilson, the County Executive for the County of Fairfax, had never seen the photographs before, but when shown them, quickly testified that he would have wanted someone in the County to do something about the condition of the premises. When Petitioner's attorney asked Mr. Wilson if the photographs depicted a dangerous situation, he responded

that such was "very tempting for kids to go there and play."

The case against Respondent Lentini was limited solely to the allegation that Petitioner's double jeopardy rights were violated when Lentini obtained the second and third summonses. But every judge that has heard that argument has denied it, including Judge Rothrock, the same judge that ruled § 1309.1 BOCA Code inapplicable to Petitioner's land.

The BOCA Code, § 122.3 specifically says, "Each day that a violation continues shall be deemed a separate offense;" and the Virginia Uniform Statewide Building Code specifically incorporates the BOCA Code as the law of Virginia. Furthermore, the facts herein clearly show a continuing violation of § 1309.1; and the law seems clear that such separate offenses can be prosecuted. 22 C.J.S. *Criminal Law* § 281 (1961). *State v. Ell-Gee, Inc.*, 255 So.2d 542 (Fla. App. 1971); *Dapper v. Mun. Ct. San Diego*, 81 Cal. Rptr. 340 (Ct. App. 1959), *cert. denied*, 399 U.S. 910 (1970).

Petitioner insists that the first County Court trial found no offense committed by Petitioner in violation of § 1309.1. Better stated, Judge Whitestone had no evidence before him whereby he could find such a violation since he had ruled out the evidence; namely, the photographs of the rubble. Because it was a daily separate offense and because the Judge and Assistant Commonwealth Attorney Davis told him so, Lentini obtained a second summons which was heard by Judge Hurst, who dismissed the case, not because § 1309.1 wasn't being violated, but because Petitioner wasn't re-served with a notice of violation. Again, a judge told Lentini that there was a continuing violation, so he obtained the third summons but only after Assistant

Commonwealth Attorney Davis recommended the procedure and drafted the summons.

What would any reasonable official do if he were Lentini? Of course, he would follow judges' and prosecutor's advice and obtain a summons until the case was heard in full. If Lentini is guilty of anything, it is that, in this day and age of officials who so frequently do haphazard jobs, he cared about his job and the public he seeks to serve in an absolutely perfect display of good faith.

The *Imbler* decision should also apply to Respondent Lentini under the facts of this case because Lentini did nothing without first securing the authorization and direction of the Commonwealth's attorney's office in the guise of Gary Davis. Since Davis clearly has immunity under *Imbler*, Lentini should likewise have immunity since he did nothing without prosecuting attorney direction.

Concerning the prayer for injunctive relief, the injury contemplated must be "real, not fancied; actual, not prospective; and threatened, not imagined." 11 *Wright & Miller, Federal Practice and Procedure*, § 2942 (1973). Petitioner charges broadly and generally that, at some unknown date in the future he will be subjected to prosecution by the Respondents under an unspecified statute. Yet, Respondents' counsel expressly stated to the trial court that Petitioner would not be prosecuted under § 1309.1 under the same set of facts regarding the same property. This representation was incorporated into the trial court's Order of March 6, 1975, denying Petitioner's prayer for injunctive relief. Petitioner's allegations that he is threatened with irreparable injury are "nothing more than speculation about the future" which cannot serve as a basis for

injunctive relief. *Boyle v. Landry*, 401 U.S. 77, 81 (1971).

Petitioner lacks standing to ask for injunctive relief against enforcement of § 1309.1 BOCA because he cannot show "that he has sustained or is immediately in danger of sustaining some direct injury as a result of its enforcement." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923), cited in *Poe v. Ullman*, 367 U.S. 497, 505 (1961). The fact that Respondents have expressly agreed not to prosecute Petitioner under § 1309.1 and have not threatened prosecution under any other ordinance, deprives this controversy of "the immediacy which is an indispensable condition to constitutional adjudication." *Poe v. Ullman, supra*, at 508. "If the prosecutor expressly agrees not to prosecute, a suit against him for injunctive relief is not such an adversary case as will be reviewed here." Id. at 507-08 citing *CIO v. McAdory*, 325 U.S. 472, 475.

Petitioner cites the statements of Respondent Lentini that, "I am going to scrutinize the code a little better" and "I will have to see what I can find in the Code" (Lentini deposition of January 30, 1975, p. 60) as the basis for his request for injunctive relief. But this isolated statement was not part of Petitioner's case in chief and is far short of the "clear threat of imminent prosecution(s)" which justifies court intervention and injunctive relief. *See, Poe v. Ullman*, 367 U.S. 497, 501, (1961) (prosecutor's statements, that, in course of his public duty, he intended to prosecute any offenses against state law did not constitute an immediate threat to plaintiffs in light of state's failure to prosecute).

The trial court's denial of injunctive relief was in accord with the broad discretion permitted trial courts in shaping equity decrees. See, 11 *Wright & Miller, supra*, citing *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The fact that the appellate court reaches a contrary conclusion has been held not to warrant a reversal. *Id.* at § 2962. The scope of review is limited to determining whether the lower court abused its discretion. *Doran v. Salem Inn., Inc.*, 422 U.S. 922 (1975). 7 *Moore's Federal Practice* ¶ 65.04(2) (1975); and the trial court's findings of fact will not be disturbed unless clearly erroneous. *Wright & Miller, supra*, at § 2692; *Moore's, supra*, at ¶ 65.21.

CONCLUSION

For the reasons cited above, Respondents pray that this Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted
this day of April, 1976,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1975

CASE NO. 75-1401

PAUL LEE SWEENY, *Petitioner*

V.

FRANCIS D. LENTINI,
LAWRENCE R. KEENAN, and
GLEN SHENK
Respondents

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, IN AND FOR THE FOURTH CIRCUIT

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PETITIONER'S REPLY TO RESPONDENTS'BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. INTRODUCTION

The Petitioner, Paul Lee Sweeny, respectfully submits this reply to the respondents' brief in opposition to the petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit. The petitioner would show the Court that the contentions made in respondents' brief are wholly unsupported by the record in this case and are clearly erroneous. The petitioner would also represent to the Court that it is clear that the decision of the United States Court for Appeals for the Fourth Circuit is in conflict with decisions of this Court and decisions of other Courts of Appeals.

Additionally, as already demonstrated by the petition for writ of certiorari, the Fourth Circuit has decided important questions of federal law and procedure which have not been, but should be settled by this Court. The Court of Appeals has failed to consider whether pretrial summary judgment can be granted under Rule 56, Federal Rules of Civil Procedure, by a District Judge finally dismissing petitioner's complaint for damages with prejudice where the District Judge did not hear oral argument on the motion after it had been requested by all parties. In addition, the Fourth Circuit has not considered the decisions of this Court holding that the Double Jeopardy Clause of the Fifth Amendment includes the doctrine of collateral estoppel; and it has granted a county housing and

licensing official absolute immunity for repeatedly violating petitioner's right to be protected from Double Jeopardy. By its failure to consider petitioner's right to oral argument of respondents' motion for summary judgment, under Rule 56 of the Federal Rules of Civil Procedure; by its failure to embody the doctrine of collateral estoppel in the Double Jeopardy Clause; and by its grant of absolute immunity to respondent Lentini for violating petitioner's right not be placed in Double Jeopardy, the Fourth Circuit has erroneously decided important federal questions by concluding that petitioner had no cause of action against any of the respondents.

B. REASONS FOR GRANTING THE WRIT

(a) Respondents' "facts" not in the record.

Petitioner will not repeat the argument already contained in his petition for writ of certiorari. However, petitioner does desire to reiterate the fact that none of the respondents adduced any evidence at the trial below. Accordingly, when under the guise of "facts", respondents repeatedly refer to what they say Gary Davis, Assistant Commonwealth Attorney, did or advised (page 7 of respondents' brief); to what they say Judge Morris did or advised; to what they say was contained in various "affidavits", or to what they say respondents' "photographs" show, respondents have indulged in sheer fantasy in an attempt to mislead the Court as to what transpired in the Trial Court. There were no "affidavits" introduced in evidence in this case by either petitioner or by respondents at the trial;

the "photographs" referred to by respondents are not in evidence; and, in fact, there is no evidence at all in this case controverting petitioner's evidence adduced in the Trial Court. This is made crystal clear by the Trial Judge's remarks to respondents' counsel during oral argument of respondents motion for a directed verdict, at page 85 of the Transcript of Proceedings in the Trial Court, as follows:

"Mr. Brandt: (counsel for respondents).

" * * * How can we expect this man (respondent Lentini) in each case didn't do this on his own, Judge. He did it after a judge told him it was a continuing offense. He did it after the assistant commonwealth attorney drafted the summons for him.

"The Court: There is no evidence as to that yet in this case. There is your opening statement and it may be that is what the evidence will show."

Notwithstanding the foregoing admonition by the Trial Judge of the impro-

priety of the argument of respondents' counsel, they still persist in making the same argument even in this Court.

(b) Rule 56, Federal Rules of Civil Procedure, entitles a litigant to argument before a summary judgment dismissing his case with prejudice can be granted.

The argument in support of the above proposition set forth on pages 13-15 of the petition for writ of certiorari will not be repeated here. Respondents cite Rule 78 of the Federal Rules of Civil Procedure and Local Rule 11R in support of their contentions that summary judgment finally dismissing a litigant's complaint with prejudice can be granted without oral argument after request for oral argument has been made. Rules 56 and 78 must be read with Rule 83 of the Federal Rules of Civil Procedure, which latter Rule respondents fail to mention.

Rule 83, Federal Rules of Civil Procedure provides that the District Courts can make no rules inconsistent with the Federal Rules of Civil Procedure. Respondents also fail to mention Local Rule 11G of the United States District Court for the Eastern District of Virginia, which specifically provides for oral argument on Motions for Summary Judgment. Two circuit courts of appeals have held that it is reversible error to grant summary judgment dismissing a case on its merits with prejudice without affording a hearing when requested. It is therefore respectfully submitted that this Court, pursuant to its supervisory power over all questions concerning the application and interpretation of the Federal Rules of Civil Procedure, should settle this important question arising under Rule 56.

(c) The Burden of Proving "Good Faith" is on Respondent Lentini who introduced no evidence in the Trial Court.

Contrary to assertions contained in respondents' brief, no court has ever held that a county official such as respondent Lentini enjoys absolute immunity from damage suits arising under Title 42, Sections 1983 and 1985 of the United States Code. To accord absolute immunity in the case of respondent Lentini would completely emasculate the Act and constitute a judicial repeal of the same. Said respondent is entitled only to the qualified defense of good faith and probable cause, and he has the burden of alleging and proving such qualified defense. In Williams v. Hilliard, 516 F. 2d 1344 (C.A.6, 1975), there was a damage award against both the prosecutor and state investigator

for unconstitutionally withholding exculpatory evidence. This Court denied the state investigator's petition for a writ of certiorari, based on his claim that he only followed the prosecution's orders, the same claim made by respondent Lentini in this case, thereby refusing to accord the state investigator the absolute immunity which the Fourth Circuit has in effect accorded respondent Lentini in the instant case by upholding the Trial Court's dismissal as to Lentini without requiring him to prove his asserted qualified defense of good faith and probable cause.

(d) Petitioner has thrice been put in jeopardy by the conduct of said respondent and others, in violation of his Constitutional right to be protected against Double Jeopardy.

Respondents, by their admissions in the Trial Court, have conceded that respondent Lentini's three criminal prosecutions of petitioner under the same section 1309.1 of the BOCA building code for the same condition of the same property was wrongful. Thus, at pages 102 et seq. of the Transcript of Proceedings in the Trial Court, the following appears:

"The Court: * * *

"Is there any indication that Mr. Lentini intends to try to enforce 1309.1 against Mr. Sweeny?

"The county is here. Some representative of the county is here. What is their position on what Mr. Lentini intends to do with regard to 1309.1?

"Mr. Symanski (Assistant County Attorney):

"I have no indication that Mr. Lentini is going to proceed under that section against Mr. Sweeny, no, your Honor.

"The Court: I want something a little stronger than that.

"Mr. Symanski: We will represent that Mr. Lentini will not proceed under 1309.1 under the same set of facts and the same property.

"The Court: Against Mr. Sweeny?

"Mr. Symanski: Right.

"The Court: All right. That strengthens my determination that the injunction should be denied* * *

"Mr. Sullivan: Your Honor, may I ask to get in the record - -

"The Court: -- will be denied.

"Mr. Sullivan: - - in the record that this is the same factual situation on all three things, and that is the basis and the fact. I want that just in case we desire to pursue it further."

If, as respondent Lentini's counsel had admitted, Lentini cannot prosecute petitioner again under section 1309.1 of the BOCA building code, it follows, under the doctrine of collateral estoppel, that Lentini cannot again prosecute petitioner for any alleged violation based on the same condition of the same property, no

matter what alleged criminal law he proceeds under. It likewise follows from the foregoing that the second and third criminal prosecutions of petitioner by respondent Lentini, after petitioner's acquittal at the first trial following the testimony of three witnesses for the prosecution, and after jeopardy had attached, violated petitioner's right not to be twice put in jeopardy for the same alleged offense, since the condition of the property, which was the subject matter of each prosecution admittedly never changed but remained the same throughtout all three trials.

(e) Respondents Keenan and Shenk should not be entitled to absolute immunity from claims for damages or injunctive relief under Title 42, Sections 1983 and 1985, U.S.C. under the facts of this case.

The allegations of the complaint

against respondent Shenk appear on page 7 of the petition, and the allegations against respondent Keenan appear on page 8 thereof. The advance sheets of 96 Supreme Court Reporter pages 943-1153, containing the report of this Court's decision in Imbler v. Pachtman, No. 74-5435, decided by this Court on March 2, 1976, did not reach the office of petitioner's counsel until April 14, 1976, 12 days after the petition was filed herein, and hence that decision was not discussed in said petition. As counsel read Imbler, however, the absolute immunity accorded a prosecutor applies only to acts performed by him within the scope of his duties. And the magistrate Shenk does not have absolute immunity at all. The Fourth Circuit, in McCray v. Maryland,456 F2d 1 (4 Cir. 1972), has held that a court clerk is

amenable to a damage suit under Title 42, Section 1983, U.S.C., thereby denying the clerk absolute immunity.

The allegations made under oath against respondent Keenan, which he has never denied under oath, clearly involve conduct outside the scope of his duties. There is no reason known to petitioner's counsel to afford a prosecutor absolute immunity for intentional wrongul conduct where he deliberately and knowingly misleads the court as to the nature of prior proceedings and by misrepresentation, conceals from the court facts which would have exculpated petitioner. Such conduct on the part of the prosecutor would appear no different in principle from any other tortious conduct committed by a prosecutor during the course of a trial, as, for example, committing an assault on opposing counsel or some by-

stander in the court room. And no immunity from the grant of the injunctive relief sought by petitioner against all respondents exists in any case.

CONCLUSION

The opinion and judgment of the Fourth Circuit effectively denies petitioner all relief, notwithstanding the clear showing herein of violations of petitioner's constitutional right not to be put in jeopardy more than once for the same alleged offense. Unless respondents are prevented from doing so, by the grant of certiorari herein or summary reversal of the Fourth Circuit, it is submitted that petitioner is in danger of being subjected to further prosecutions at the hands of respondents, or some of them, for the same condition of the same property, a charge of which he has been three times

acquitted, notwithstanding petitioner's clear constitutional right not to be put in jeopardy more than once for the same alleged offense.

It is submitted that the opinion of the Fourth Circuit is in error and certiorari should be granted.

Respectfully submitted,

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